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In the Supreme Court of the United States

OCTOBER TERM, 1953

BEACON FEDERAL SAVINGS AND LOAN ASSOCIATION,

PETITIONER,

v.

FEDERAL HOME LOAN BANK BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and rules involved	2
Statement	2
Argument	5
Conclusion	10
Appendix	11

CITATIONS

Cases:	
Beacon Federal Savings and Loan Association v. *Federal Home Loan Bank Board*, 143 F. Supp. 534	3, 8
Erstling v. *Southern Bell Telephone & Telegraph Co.*, 255 F. 2d 93	6
Fahey v. *Mallonee*, 332 U.S. 245	9
Fahey v. *O'Melveny & Myers*, 200 F. 2d 420	9
Federal Trade Commission v. *Minneapolis-Honeywell Co.*, 344 U.S. 206	6, 7
Greater Delaware Valley Federal Savings & Loan Association v. *Federal Home Loan Bank Board*, 262 F. 371	8
Great Southern Fire Proof Hotel Co. v. *Jones*, 177 U.S. 449	7
Marten v. *Hess, et al.*, 176 F. 2d 834	7
Matteson v. *United States*, 240 F. 2d 517	7
United States v. *Ragen*, 171 F. 2d 788	7
United States v. *Schaefer Brewing Co.*, 356 U.S. 227	6, 7-8
Statutes and rules:	
Home Owners' Loan Act of 1933, 48 Stat. 128, as amended, 12 U.S.C. (Supp. II) 1461 *et seq.*, Section 5(d)	2, 9, 11
Federal Rules of Civil Procedure:	
Rule 58	6, 15
Rule 73(a)	5, 16
Rule 79(a)	6, 16

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Wisconsin on the merits (Pet. 27) is reported at 162 F. Supp. 350. The opinion of the District Court denying the petition for allowance of attorneys' fees and disbursements (Pet. 55) is reported at 165 F. Supp. 124. The opinion of the Court of Appeals (Pet. 58) is reported at 266 F. 2d 246.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1959. A timely petition for rehearing was

denied on June 2, 1959. The petition for a writ of certiorari was filed on July 2, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's appeal to the Court of Appeals was timely.

2. Whether the Home Owners' Loan Act of 1933 authorizes the Federal Home Loan Bank Board, upon finding that an emergency exists, to appoint *ex parte* a temporary Supervisory Representative in Charge of a federal savings and loan association.

3. Whether the Board abused its discretion in appointing a conservator for petitioner rather than employing one of the other remedies provided by the Act.

4. Whether the Board's appointment of such conservator, made in full compliance with the statutory provisions therefor, denied petitioner due process of law.

STATUTES AND RULES INVOLVED

The pertinent statutes and rules are set forth in the Appendix, *infra*, pp. 11-17.

STATEMENT

On March 20, 1956, the Federal Home Loan Bank Board, acting pursuant to Section 5(d)(2) of the Home Owners' Loan Act of 1933 (12 U.S.C. (Supp. II) 1464(d), App. *infra*, p. 13), appointed a Supervisory Representative in Charge of petitioner, a federal savings and loan association (Pet. 19-20).[1] The Board's

[1] That section provides that, "If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists and the Board determines that an emergency exists requiring immediate action, the Board is authorized to appoint *ex parte* and without notice a Supervisory Representative in Charge to take charge of said association and its affairs * * *."

order stated that, through certain business dealings, petitioner had violated the Act and the Board's regulations and conducted an unsafe and unsound operation, and that an emergency existed requiring the appointment of the Representative (*ibid.*).[2]

The Board then instituted an administrative proceeding to determine whether petitioner had violated the Act and its regulations and engaged in unsafe and unsound operations and, if so, whether a conservator should be appointed (Pet. 21, 28). After hearings at which both the Board and petitioner presented evidence, the examiner filed a recommended decision proposing that a conservator be appointed (Pet. 21-22, 28). The Board approved the recommended decision and, on May 21, 1957, appointed a conservator to take charge of petitioner (Pet. 28).

Petitioner then brought this suit against the Board in the District Court to review the appointment of the conservator (Pet. 28). Both parties moved for summary judgment (Pet. 27), and the District Court granted the Board's motion and denied that of petitioner (Pet. 52). The court sustained the Board's action in making the initial *ex parte* appointment of the Supervisory Representative in Charge, and also upheld the Board's decision on the merits in appointing the conservator. After carefully reviewing the evi-

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[2] Petitioner filed an action in the District Court challenging the Board's *ex parte* appointment of the Supervisory Representative and alleging that the Board's charges were false. The District Court dismissed the action on the ground that the Board had followed the proper procedures in appointing the Supervisory Representative and that, as to the merits of the case, petitioner had not exhausted its administrative remedies. *Beacon Federal Savings and Loan Association* v. *Federal Home Loan Bank Board*, 143 F. Supp. 534 (E.D. Wis.).

dence (Pet. 35-52) the District Court concluded (Pet. 52): "The Board's finding that Beacon had a management which was unsafe or unfit to manage a Federal savings and loan association is clearly supported by the weight of the evidence as is evidenced by the series of unlawful and unsound transactions upon which Beacon's board permitted the Association to enter."

The court's opinion directed the Board "to prepare an order in conformity with this opinion" (Pet. 52). On June 9, 1958, the court entered an "Order for Judgment" which, after reciting the proceedings and the court's decision, denied petitioner's motion for summary judgment and (R. 45; Pet. 53):

> ORDERED, that defendant's motion for summary judgment dismissing the within action on its merits be and the same hereby is granted and that judgment be entered accordingly together with such costs as the defendant may be entitled to receive of the plaintiff.

On the same day, the clerk made the following notation in the civil docket (see Record):

> Order for Judgment—order granting deft's motion for summary judgment dismissing action on merits.

On July 10, 1958, petitioner filed in the District Court a petition seeking disbursements, legal fees and other expenses incurred in the proceedings (R. 48). On August 28, 1958, the District Court denied this petition (Pet. 55).

On September 3, 1958, the clerk of the court signed and entered in the docket, a document captioned "judgment" which "ADJUDGED and DECREED that the

complaint herein be dismissed upon its merits" (Pet. 57).

On September 19, 1958, petitioner filed a notice of appeal to the Court of Appeals "from the final judgment entered in this action on the 3rd day of September, 1958 * * * and from intermediate orders therein adverse to plaintiff," including the order of August 28, 1958 denying the petition for allowance of attorneys' fees and disbursements (Pet. 60).

On the Board's motion, the Court of Appeals dismissed the appeal on the merits as untimely.[3] It held that the order signed by the district court and entered in the civil docket on June 9, 1958 "finally disposed of the action on the merits" (Pet. 61-62); that the sixty-day period for appeal began to run on that date; and that the notice of appeal filed on September 19, 1958, more than 60 days after June 9, 1958, was therefore untimely. The Court of Appeals further stated that petitioner's arguments "on the merits," while not before it, had been rejected in another case by the Third Circuit, and that "[i]f called upon to do so, we would approve this holding * * *" (Pet. 62).

ARGUMENT

I

The Court of Appeals correctly held that the District Court entered its final judgment on June 9, 1958, and that petitioner's appeal, filed more than 60 days thereafter, was therefore untimely under Rule 73(a) of the Federal Rules of Civil Procedure.

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[3] The court affirmed the order of August 28, 1958, denying counsel fees and disbursements (Pet. 62). That ruling is not here challenged.

The judgment of June 9 contained all the "essential elements" of a final judgment, and evidenced the judge's intention that it should be his final act in disposing of the case on the merits. *United States* v. *Schaefer Brewing Co.*, 356 U.S. 227, 232. It denied petitioner's motion for summary judgment, granted the Board's motion, and directed that judgment be entered accordingly, together with costs. After the court had signed this judgment, all that remained to be done was the ministerial act of "notation of [the] judgment in the civil docket", in accordance with Rules 58 and 79(a). Such docket entry was made by the clerk on the same day, and it "show[ed] * * * the substance of [the] judgment of the court" (Rule 79(a)). Thus, the June 9 judgment "put to rest the questions which the parties had litigated * * *. It was neither 'tentative, informal nor incomplete.'" *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 213.

The subsequent action of the clerk on September 3, 1958, in signing and entering "a more formal judgment, could not constitute a second final judgment in the case nor extend the time to appeal" (*Schaefer* case, *supra*, p. 233). The second judgment was not signed by the judge, but only by the clerk. It neither "disturbed [n]or revised legal rights and obligations which, by its prior judgment, had been plainly and properly set

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[1] Petitioner attempts to derive some support from the fact that the September 3 document was captioned "Judgment," whereas that of June 9 was captioned "Order for Judgment" (Pet. 7-8). But "the question of whether the time for [appeal] was to be enlarged cannot turn on the adjective which the court below chose to use in the caption of its second judgment" (*Minneapolis-Honeywell* case, *supra*, p. 212). See, also, *Erstling* v. *Southern Bell Telephone & Telegraph Co.*, 255 F. 2d 93 (C.A. 5), where the

tled with finality" (*Honeywell* case, *supra*, p. 212). Nor did the subsequent filing of a petition seeking award of attorneys' fees and disbursements extend the time for appeal. For even if the court had granted such petition, it would have had "no effect on the merits of the decision that we are now asked to review in the petition for certiorari" (*Honeywell* case, *supra*, p. 211).

Petitioner contends (Pet. 6-7), however, that the actions of the district judge and the parties subsequent to the entry of the June 9 judgment, in connection with its application for attorneys' fees, show that the judgment was not intended to be final. But the claim for attorney's fees was not even raised until July 10. When the June 9 judgment (which contained all the essential elements of finality, see *supra*, p. 6), was entered, therefore, it was intended to mark the end of the case. It is well settled that, once an effective, final judgment has been entered, neither the subsequent actions of the district court, nor waiver, nor the consent of both parties, can operate to extend the time for appeal. *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U.S. 449, 453; *United States* v. *Ragen*, 171 F. 2d 788 (C.A. 7); *Marten* v. *Hess, et al.*, 176 F. 2d 834 (C.A. 6); *Matteson* v. *United States*, 240 F. 2d 517 (C.A. 2).

In any event, the correctness of the ruling below that petitioner's appeal was untimely presents no question warranting review by this Court. For the Court of Appeals applied the criteria enunciated by this Court in *Schaefer* for determining whether a judgment is final for appeal purposes; the correctness of that

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court refused to draw any distinction between the fact that the first judgment (which it held final) was captioned "Order" and the second judgment was captioned "Final Judgment."

application involves only "a discrete instance[,] a particular nonrecurring set of circumstances" (Mr. Justice Frankfurter, dissenting, in the *Schaefer* case, *supra*, p. 236).

II

Since petitioner's appeal to the Court of Appeals was untimely, it is unnecessary to consider the substantive issues. However, we shall briefly show that, even if they were properly before this Court, they have no substance.

1. Petitioner attacks the preliminary action of the Board in appointing *ex parte* a Supervisory Representative in Charge, on the ground that the Act requires notice and hearing before such an appointment (Pet. 9-13). However, since the temporary appointment of the Supervisory Representative has now been superseded by the permanent appointment of the conservator (who was appointed after notice and hearing), any question with respect to the former appointment is moot. Moreover, as the district court correctly held in the earlier suit by petitioner against respondent (see note 2, *supra*), the Act gives the Board, upon finding that a federal savings and loan association is violating laws or regulations, the discretion either to appoint *ex parte* a temporary Supervisory Representative in Charge, or to follow the notice and hearing provisions required for a permanent appointment. *Beacon Federal Savings and Loan Association* v. *Federal Home Loan Bank Board*, 143 F. Supp. 534, 536 (E.D. Wis.); cf. *Greater Delaware Valley Federal Savings and Loan Association* v. *Federal Home Loan Bank Board*, 262 F. 2d 371, 373-374 (C.A. 3).

2. Petitioner, relying on the general rule that a receivership is to be regarded as a remedy of last resort, argues (Pet. 13-14) that, since the Act provides for less drastic remedies than appointing a conservator, the Board erred "as a matter of law" in appointing a conservator.

The Act, however, provides four grounds for the appointment of a receiver or conservator of a federal savings and loan association, and authorizes the Board to appoint one whenever it finds that any of those grounds exist. Section 5 (d)(2), *infra*, p. 13. Once the grounds for such an appointment are found to exist (as they were here), the Act leaves it to the Board's discretion to select the appropriate remedy. Here the Board did not abuse its discretion in concluding that, because of numerous and serious acts of mismanagement involved, the appointment of a conservator was necessary to protect the public interest. See *Fahey* v. *Mallonee*, 332 U.S. 245, 250-251.

3. Finally, petitioner's contention (Pet. 15-18) that the Boards' actions denied it due process of law is frivolous. The Board fully complied with the statutory procedures governing the appointment of a conservator, including notice and hearing and a full statement of reasons for its action, and the Board's ruling was fully subjected to judicial review. In the circumstances, petitioner's constitutional argument comes down to the contention that it has the right to operate as a federal savings and loan association free from regulation. The law is to the contrary. See *Fahey* v. *Mallonee*, *supra*, pp. 253-254; *Fahey* v. *O'Melveny & Myers*, 200 F. 2d 420 (C.A. 9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1959.

APPENDIX

Section 5(d) of the Home Owners' Loan Act of 1933, as amended in 1954 (68 Stat. 634; 12 U.S.C. (Supp. II) 1464(d)) provides:

(d)(1) The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, or any other law or regulation, and in the administration of conservatorships and receiverships as provided in paragraph (2) of this subsection, the Board is authorized to act in its own name and through its own attorneys. The Board shall have power to sue and be sued, complain and defend in any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico. It shall by formal resolution state any alleged violation of law or regulation and give written notice to the association concerned of the facts alleged to be such violation, except that the appointment of a Supervisory Representative in Charge, a conservator or a receiver shall be exclusively as provided in paragraph (2) of this subsection. Such association shall have thirty days within which to correct the alleged violation of law or regulation and to perform any legal duty. If the association concerned does not comply with the law or regulation within such period, then the Board shall give such association twenty days' written notice of the charges against it and of a time and place at which the Board will conduct a hearing as to such alleged violation of duty. Such hearing shall be in the Federal judicial district of the association unless it consents to another place and shall be conducted

by a hearing examiner as is provided by the Administrative Procedure Act. The Board or any member thereof or its designated representative shall have power to administer oaths and affirmations and shall have power to issue subpenas and subpenas duces tecum, and shall issue such at the request of any interested party, and the Board or any interested party may apply to the United States district court of the district where such hearing is designated for the enforcement of such subpena or subpena duces tecum and such courts shall have power to order and require compliance therewith. A record shall be made of such hearing and any interested party shall be entitled to a copy of such record to be furnished by the Board at its reasonable cost. After such hearing and adjudication by the Board, appeals shall lie as is provided by the Administrative Procedure Act, and the review by the court shall be upon the weight of the evidence. Upon the giving of notice of alleged violation of law or regulation as herein provided, either the Board or the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders. The Board may apply to the United States district court of the district where the association affected has its home office for the enforcement of any order of the Board and such court shall have power to enforce any such order which has become final. The Board shall be subject to suit by any Federal savings and loan association with respect to any

matter under this section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, to the Home Loan Bank Board, Washington, District of Columbia.

(2) The grounds for the appointment of a conservator or receiver for a Federal savings and loan association shall be one or more of the following: (i) insolvency in that the assets of such association are less than its obligations to its creditors and others, including its members; (ii) violation of law or of a regulation; (iii) the concealment of its books, records, or assets or the refusal to submit its books, papers, records, or affairs for inspection to any examiner or lawful agent appointed by the Home Loan Bank Board; and (iv) unsafe or unsound operation. The Board shall have exclusive jurisdiction to appoint a Supervisory Representative in Charge, conservator, or receiver. If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists and the Board determines that an emergency exists requiring immediate action, the Board is authorized to appoint ex parte and without notice a Supervisory Representative in Charge to take charge of said association and its affairs who shall have and exercise all the powers herein provided for conservators and receivers. Unless sooner removed by the Board, such Supervisory Representative in Charge shall hold office until a conservator or receiver, appointed by the Board after notice as herein provided, takes charge of the association and its affairs, or for six months.

or until thirty days after the termination of the administrative hearing and final proceedings herein provided, or until sixty days after the final termination of any litigation affecting such temporary appointment, whichever is longest. The Board shall have the power to appoint a conservator or receiver but no such appointment of a conservator or receiver shall be made except pursuant to a formal resolution of the Board stating the grounds therefor and except notice thereof is given to said association stating the grounds therefor and until an opportunity for an administrative hearing thereon is afforded to said association. Such hearing shall be held in accordance with the provisions of the Administrative Procedure Act and shall be subject to review as therein provided and the review by the court shall be upon the weight of the evidence. A conservator shall have all the powers of the members, the directors, and officers of the Federal association and shall be authorized to operate it in its own name or conserve its assets in the manner and to the extent authorized by the Board. The Board shall appoint only the Federal Savings and Loan Insurance Corporation as receiver for any Federal savings and loan association, which shall have power as receiver to buy at its own sale subject to approval by the Board. With the consent of the association expressed by a resolution of the board of directors or of its members, the Board is authorized to appoint a conservator or receiver for a Federal association without notice and without hearing. The Board shall have power to make rules and regulations for the reorganization, merger, and liquidation of Federal associations and for such associations in conservatorship and receivership and for

the conduct of conservatorships and receiverships. Whenever a Supervisory Representative in Charge, conservator, or receiver, appointed by the Board pursuant to the provisions of this section, demands possession of the property, business and assets of any association, the refusal of any officer, agent, employee, or director of such association to comply with the demand shall be punishable by a fine of not more than $1,000 or by imprisonment for not more than one year or both by such fine and imprisonment.

Rule 58 of the *Federal Rules of Civil Procedure* provides:

> Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

Rule 73(a) of the *Federal Rules of Civil Procedure* provides in part:

> (a) *When and How Taken.* When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.
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> * * * * *

Rule 79(a) of the *Federal Rules of Civil Procedure* provides:

> (a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Admin-

istrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

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